STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2013
v	No. 307054 Kent Circuit Court
RICHARD DAMIEN OSBORNE, Defendant-Appellant.	LC No. 10-010055-FC

ON SECOND REMAND

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

This first-degree criminal sexual conduct case is before us for a second time on remand from the Supreme Court. In March 2011, defendant, Richard Damien Osborne, pleaded guilty to first-degree criminal sexual conduct, MCL 750.520b(1)(a), for an act of oral penile penetration involving a six-year-old victim in 2000. The trial court sentenced defendant to 70 months to 21 years' imprisonment. Defendant filed a delayed application for leave to appeal, challenging the trial court's scoring of Offense Variable (OV) 9, MCL 777.39; OV 11, MCL 777.41; and OV 13, MCL 777.43. This Court denied defendant's application for lack of merit in the grounds presented. *People v Osborne*, unpublished order of the Court of Appeals, entered January 9, 2012 (Docket No. 307054). Defendant then filed an application for leave with our Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Osborne*, 493 Mich 851; 820 NW2d 505 (2012). On remand, we concluded that defendant had waived his scoring challenges because he voluntarily entered into a plea agreement containing "a specific minimum-sentence range of 42 to 70 months' imprisonment." *People v Osborne*, unpublished memorandum opinion of the Court of Appeals, issued February 14, 2013 (Docket No. 307054), slip op at 1. Thus, we affirmed defendant's conviction and sentence. *Id.* at 2. Defendant again filed an application for leave with our Supreme Court, which remanded the case to this Court and ordered us to consider the merits of defendant's challenges to the trial court's scoring of OV 9, OV 11, and OV 13. *People v Osborne*, 494 Mich 861; 831 NW2d 240 (2013). Because we conclude that the trial court erred in scoring OV 11, we reverse and remand for resentencing.

Since this case was previously before this Court, our Supreme Court has clarified the quantum of evidence necessary to support a scoring decision and the standard of this Court's review of scoring challenges:

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

I. OV 9

Defendant first argues that the trial court erred by scoring OV 9 at ten points. We disagree.

This issue is unpreserved because defendant did not raise it in the trial court; "if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant cannot raise the error on appeal except where otherwise appropriate, as in a claim of ineffective assistance of counsel." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). However, review of an unpreserved scoring challenge is for plain error if the defendant's statutory minimum sentence falls outside the appropriate guidelines range. See *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The sentencing guidelines instruct a trial court to score ten points for OV 9 where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). A victim under MCL 777.39 is "each person who was placed in danger of injury or loss of life . . . ." MCL 777.39(2)(a). OV 9 must be scored solely on the basis of the defendant's conduct during the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009). A '"sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial."' *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008), quoting *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). "A presentence investigation report [PSIR] is presumed to be accurate and may be relied on by the trial court unless effectively challenged by the defendant." *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003).

Here, defendant's guilty plea did not include any reference to a second person at risk of injury at the time he solicited oral sex from the victim. However, the PSIR describes the context in which defendant's charges arose. Defendant's girlfriend left him at home alone with five young children whom she was babysitting. The children ranged in ages from four to six years old. While the children were watching cartoons in the living room, defendant summoned the victim to an upstairs bedroom where he showed her a pornographic movie and directed her to perform oral sex upon him. All of the children were interviewed after the victim's allegations

came to light years later[1], and each of the children disclosed that defendant had summoned them one or more times to an upstairs bedroom where he showed them pornography and, for several of them, solicited sexual interaction (oral sex or to "play doctor"). One witness described an incident where defendant showed three of the girls a pornographic movie together. The witnesses stated that these incidents occurred when defendant either asked one of them to come upstairs or solicited a volunteer from among the children to help him with a task, such as folding the laundry. One witness recalled four of the children being together on the bed when defendant told them he was going to show them a "trick." He then had the victim perform oral sex on him in front of the others. On a later occasion, defendant got that witness in the bedroom alone with him and asked her if she remembered what the victim did with him, at which time the girl indicated she would not do it; defendant sent her back downstairs. Although the victim's description of the incident does not include other children being present in the bedroom at the time of the offense, this Court's ruling in *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009), supports a score of ten points in this instance. In *Waclawski*, this Court held as follows:

> Here, there was significant evidence that both M and P would sometimes spend the night at defendant's home with K [the victim]. Simply because there are no pictures of M and P on the night that K was assaulted does not mean that they were not present and the same goes for the other victims. On the basis of the testimony, it seems more reasonable that the other boys were sleeping while defendant was assaulting his chosen victim. There was even testimony from P that he woke up one night and saw defendant kneeling down by K's bed. Clearly the record demonstrates that defendant had a choice of victims when K and his friends would stay the night at his house while sometimes watching pornography and drinking alcohol provided by defendant, and also supports the conclusion that defendant would choose a victim while the other boys were present. We conclude that the trial court properly scored defendant 10 points for OV 9 because the record supports the inference that at least two other victims were placed in danger of physical injury when the sentencing offenses were committed. [*Waclawski*, 286 Mich App at 684.]

In the present case, a preponderance of the evidence supports a finding that, like the defendant in *Waclawski*, at the time of the sentencing offense defendant was choosing among several potential victims, all of whom were in danger of sexual molestation by him. Although this Court held in *People v Phelps*, 288 Mich App 123,138-139; 791 NW2d 732 (2010), that a score of ten points was not appropriate where a defendant engaged in first-degree criminal sexual conduct with the victim in the same room as other people, we pointed out that there was no evidence in the record to support the conclusion that any of the other people were actually in

[1] According to the PSIR, at or around the time of the offense, the victim's mother refused to bring the victim and the victim's sister in for an interview. Three other children in the home had told the police they saw the victim performing fellatio on defendant. Some ten years later, when the victim was sixteen years old, she came forward, as did her sister.

danger when the defendant committed criminal sexual conduct against the victim.[2] In that case, the defendant appears to have targeted the victim because she had told him earlier in the night that she was a virgin. *Id.* at 125-129. Here, as in *Waclawski*, all of the children present at the time of the offense were among defendant's pool of potential victims at any given time. Thus, the trial court did not plainly err by scoring OV 9 at ten points.

II. OV 11

Defendant also argues that the trial court erred by scoring OV 11 at 25 points. We agree.

Defendant objected to the trial court's scoring of OV 11 at sentencing; thus, his argument is preserved. In scoring OV 11, the trial court must "[s]core all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). However, the trial court may "not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). A sexual penetration arises out of the sentencing offense when it "springs from or results from," or "has a connective relationship, a cause and effect relationship, of more than an incidental sort with" the sentencing offense. *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). A sexual penetration may not be used to score OV 11 where there is no relationship between the penetration at issue and the sentencing offense. *Id*. MCL 777.41(1)(b) directs a court to score 25 points when "[o]ne criminal sexual penetration occurred."

In this case, the PSIR indicates that the victim told the police that she remembered being alone in a bedroom with defendant and performing fellatio upon him at his directive. One of the other girls recalled an incident where, as described above, defendant had several of the girls watch while he had the victim show them a "trick" by performing fellatio upon him. It appears from the record that the trial court relied on the evidence of these two incidents of sexual penetration in scoring OV 11:

[2] To the extent that *Phelps* conflicts with *Waclawski*, which we do not believe it does because they are factually distinguishable, we are bound to follow *Waclawski*. See *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473; 556 NW2d 517 (1996) ("When a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued.").

[DEFENSE COUNSEL]: OV 11 and 13, where they scored the penetration in this case -- although the instructions indicate that for -- you're not to score the one penetration that forms the basis of the charge. It was scored at 25 points.

THE COURT: How many penetrations is that?

[DEFENSE COUNSEL]: One.

THE COURT: Additional?

[DEFENSE COUNSEL]: We don't have any additional here.

THE COURT: If you read the presentence report, it says other children still recall seeing an additional incident along with each being shown pornographic movies as did the victim here.

[DEFENSE COUNSEL]: The points were given for an additional and there was only one.

THE COURT: Yes, but there is evidence of an additional one which the victim doesn't recall, but other children did recall.

Although the trial court was correct that there is evidence in the record of oral penile sexual penetration on two occasions, the PSIR is clear that those penetrations occurred on separate occasions, once when the victim was alone with defendant and once when the victim was present in a room with defendant and other girls. There is no evidence in the record that either of defendant's sexual penetrations of the victim had any "cause and effect relationship" with the other penetration. *Johnson*, 474 Mich at 101. "More specifically, there is no evidence that the first sexual penetration arose out of the second penetration or that the second penetration arose out of the first penetration." *Id.* at 102. Given the victim's lack of recall regarding the second incident, once defendant objected, the trial court should have at least inquired further concerning the circumstances of the second penetration, including taking testimony if necessary. Under the circumstances, the trial court erred by scoring OV 11 at 25 points. See *id*. at 101.

III. OV 13

Finally, defendant argues that the trial court erred by scoring OV 13 at 25 points. We disagree.

Defendant objected to the trial court's scoring of OV 13 at sentencing; thus, his argument is preserved. The sentencing guidelines direct the trial court to score OV 13 at 25 points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). "Crimes against a person" for the purposes of scoring OV 13 are only those crimes with the offense category designated as "person" under MCL 777.11 to MCL 777.18. *People v Wiggins*, 289 Mich App 126, 131 & n 3; 795 NW2d 232 (2010).

Here, the PSIR indicates that in 2000, defendant asked girls ages six years old or younger, including the victim, to perform oral sex on him on at least three occasions. MCL 750.145a, which prohibits accosting a minor, provides that

> [a] person who accosts, entices, or solicits a child . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child . . . to engage in any of those acts is guilty of a felony . . . .

As set forth in *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011), a defendant is guilty of the crime of accosting a minor

> if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act.

Here, the record supports a finding by a preponderance of the evidence that defendant encouraged a child to commit criminal sexual conduct a minimum of three separate times. Thus, there was evidence that defendant had committed three separate acts of accosting a minor under MCL 750.145a. See *id.* Accosting a minor has an offense category of "person" under MCL 777.16g and is, thus, a crime against a person for the purpose of scoring OV 13. See *Wiggins*, 289 Mich App at 131 & n 3. Further, these three incidents occurred in 2000, within five years of the sentencing offense as required by MCL 777.43(2)(a). Thus, the offense was part of a pattern of felonious criminal activity involving three or more crimes against a person as required to score OV 13 at 25 points under MCL 777.43(1)(c). The trial court did not err when it scored OV 13 at 25 points.

A defendant is entitled to resentencing on the basis of a scoring error if the error alters the recommended minimum sentence range under the legislative sentencing guidelines. *Francisco*, 474 Mich at 89-90 & n 8. First-degree criminal sexual conduct is a class A offense. MCL 777.16y. The trial court scored 80 points for defendant's offense variables, placing him in OV Level V for class A offenses. MCL 777.62. The trial court scored zero points for defendant's prior record variables (PRV), resulting in a PRV level of A. *Id.* For class A offenses, an OV Level V and a PRV Level A has a recommended minimum sentence range of 81 to 135 months under the legislative guidelines. *Id.* The trial court noted this as the applicable guidelines range, but sentenced defendant, as previously noted, based upon what it believed to be a specifically agreed upon range of 42 to 70 months. If the trial court had properly scored OV 11 at zero points, defendant would have had a total OV score of 55 points, and his OV Level would have been reduced to Level III (40-59 points), resulting in a recommended minimum sentence range

of 42 to 70 months. MCL 777.62. Because the scoring error affects the appropriate guidelines range, defendant is entitled to resentencing.[3] See *Francisco*, 474 Mich at 89-90 & n 8.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra

[3] Even though the trial court sentenced defendant based on what it understood to be a specifically agreed upon minimum sentence range of 42 to 70 months, it incorrectly believed that the actual recommended minimum sentence range was 81 to 135 months, which may have served as a basis for the trial court choosing the highest possible score of 70 points in the perceived agreed-upon range. Defendant is entitled to resentencing before the trial court with a correct understanding of the applicable guidelines range.